DATIN PEGGY TAYLOR

v.

LEONG YUET YENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P. 62 OF 1983]
28 MARCH 1985

SUCCSESSION: *Administratix suing for debt of the deceased - Default judgments entered against defendants - Defendants trying to set default judgments aside - Defence that plaintiff has no capacity to sue.*

CIVIL PROCEDURE: *Status and power of administrator under s. 39 (2) of Probate and Administration Act - Setting aside of default judgments.*

The plaintiff, who is administratrix of the estate of her husband (the deceased) is suing the defendants (administrators and administratrix of the estate of Lim Chooi Seng, deceased) for a debt owed by the defendants. Writ of summons and statement of claim was served and effected on the defendants by substituted service. When they failed to appear, the plaintiff entered judgments against the 1st and 2nd defendants but not the 3rd defendant because he was no longer one of the administrators. The 1st and 2nd defendants filed an application to have their default judgments set aside. They claimed that they have been ready to pay the sum as long as the plaintiff produced evidence of the debt as an asset of the estate of the deceased. The plaintiff had not complied with these demands and the defendants claimed that the plaintiff has no capacity to sue and that the writ of summons and proceedings are a nullity. The plaintiff said she had sent a schedule to the defendants but the defendants refused to accept it as the debt was not included in the schedule. The plaintiff had filed a corrective affidavit disclosing the debt and the Collector's certificate was produced at the hearing of the application but the defendants claimed that this late production is not sufficient.

Held:

[1] When the plaintiff issued the writ of summons, she was already in possession of valid grant of Letters of Administration as the Court had appointed her an administratrix on 21 March 1978 and she had extracted the grant on 5 November 1980.

[2] Under s. 39 (2) of the Probate and Administration Act 1959, upon grant of administration by the Court, all the movable and immovable property of a deceased person vest with the administrator. Since the grant gives the plaintiff the necessary powers to administer the estate, it was immaterial that the schedule did not identify the debt as an item of asset. The plaintiff therefore had the necessary capacity to sue and could give a valid receipt for the debt.

[3] The procedure for setting aside default judgments and the writ of summons are governed by O. 13 r. 8 and O. 12 r. 7(1) of the Rules of the High Court 1980. The defendants do not require leave of the Court to set aside the default judgment or the writ of summons, as long as a summons is filed in chambers, supported by an affidavit which they have done in this case.

[Defendants' application dismissed with costs.]

Cases referred to:
Chia Tet Liang v. Tan Soo Kiang [1939] 1 MLJ 148
Comptroller of Income-Tax v. Yan Tai Min [1965] 31 MLJ 55
P. Govindasamy Pillay & Sons Ltd. v. Lok Seng Chai & Ors. [1961] 27 MLJ 89

Legislation referred to:
Probate and Administration Act 1959, s. 39(2)
Rules of the High Court 1980, O. 12 rr. 6, 7(1), O. 13 r. 8

For the defendants/applicants - Chong
For the plaintiff/respondent - G. Krishnan

JUDGMENT

Siti Norma Yaakob J:

The plaintiff in this action is the administratrix of the estate of her husband, Eric Taylor, deceased, and she brings this action to recover RM65,625 being a debt due from the defendants as the administratrix and administrators of the estate of Lim Chooi Seng, deceased. Service of the writ of summons and statement of claim was effected on all three defendants by the way of substituted service and when they failed to appear, the plaintiff entered judgments against the first and second defendants on 13 September 1984, but not against the third defendant as she had already been informed on 20 February 1983 that he was no longer one of the administrators and on 20 November 1984 she had filed a notice of discontinuance of this action against him.

However, before the filing of the notice of discontinuance, all three defendants had on 16 October 1984, filed an application to have the writ of summons and statement of claim as well as the default judgment entered against the first defendant set aside. In a supplementary affidavit filed by their solicitors, the defendants also seek to have the judgment in default entered against the second defendant set aside and despite objections raised, I had read into the defendants' application another prayer that the default judgment entered against the second defendant be also set aside as the circumstances surrounding the entries of these two default judgments were similar and that the solicitors for the defendants were only aware after the filing of their application that judgment in default of appearance had also been entered against the second defendant.

In their affidavit in support of their application, the defendants admit that they had all along, even before the filing of this action, been willing and ready to make payment of the sum claimed provided the plaintiff produce the full grant of Letters of Administration with the schedule of assets identifying the debt as an asset of the estate and the certificate from the Collector that estate duty has either been paid or payment of it postponed so that the plaintiff can give a valid receipt to the debt. As the plaintiff had failed to do so despite several demands being made to that effect, she has no capacity to sue the defendants and that the writ of summons and the proceedings that ensued are a nullity.

By way of reply, the plaintiff exhibited the grant of Letters of Administration dated 21 March 1978, together with the Collector of Estate Duty's schedule listing the deceased's assets and the Collector's certificate of postponement. She had sent this grant to the defendants but they refused to accept it as the debt claimed does not form part of the assets of the deceased. In this respect, the plaintiff had, prior to the filing of this action, filed a corrective affidavit with the Collector of Estate Duty disclosing the debt as another item of asset and the Collector has since issued her with his certificate of postponement of payment of estate

duty and has acknowledged the debt as another item of the deceased's assets and this Certificate was produced to me at the hearing of the application. The defendants replied that the production of such a Certificate at that late stage is not good enough as it should have been done before this action was filed.

To support her contention that the plaintiff has no *locus standi* to bring this action, counsel for the defendants referred me to the following cases:

(1) *Chia Tet Liang v. Tan Soo Kiang* [1939] 1 MLJ 148
(2) *Comptroller of Income-Tax v. Yan Tai Min* [1965] 31 MLJ page 55
(3) *P. Govindasamy Pillay & Sons Ltd. v. Lok Seng Chai & Ors.* [1961] 27 MLJ 89.

In all these cases, the parties to the action are either suing or being sued in their representative capacities and in each case, although the grant of letters of administration had been granted, it was however not extracted at the time of the filing of the action and as such, the parties were not clothed with their representative capacities to have acquired titles to the estates. These cases are distinguishable from the facts of the case before me as at 22 January 1983 when she issued the writ of summons, the plaintiff was already in possession of a valid grant of Letters of Administration as the Court had appointed her an administratrix on 21 March, 1978 and she had extracted the grant on 5 November 1980, the only thing amiss was that the debt claimed is not identified as an item of asset in the schedule of assets attached to the grant.

The schedule of assets is prepared by the Collector of Estate Duty on information supplied and received by him and it is upon the compilation of the value of such assets that the Collector determines whether the estate is exempt from payment of estate duty or if it is liable to payment of estate duty, he calculates the amount payable and upon payment of such duty, he issues his certificate of payment. It is only upon payment of such duty that the administrator can extract the grant of Letters of Administration, unless the Collector decides instead to issue a certificate of postponement of payment, thereby enabling the administrator to extract the grant of Letters of Administration so as to enable him to administer the estate with a view of settling the estate duty payable. Thus in every grant of Letters of Administration, there is, attached to the grant, the schedule of the deceased's assets as well as the Collector's certificate that either the estate is exempt from payment of estate duty or payment of estate duty is postponed or estate duty has been settled in full. Thus the schedule of assets and the Collector's certificate do not state the status and powers of the administrator. Such powers are found under s. 39 (2) of the Probate and Administration Act 1959 which states that upon the grant of administration by the Court, all the movable and immovable property of a deceased person vest with the administrator. Looking at the Letters of Administration that was granted to the plaintiff, it clearly states that as an administratrix, she is to administer "all and singular the movable and immovable property of the deceased situate within the jurisdiction". As the grant itself gives the plaintiff the necessary powers to administer the estate, I consider it is immaterial that the schedule did not identify the debt as an item of asset as it is merely evidence as to whether estate duty is payable or not payable by the estate. Thus at the time when the writ was filed, the plaintiff had the necessary capacity to sue and she could give a valid receipt for the debt.

The plaintiff had also raised a procedural objection that under O. 12 r. 6 of the Rules of the High Court 1980, the first and second defendants need to obtain leave of the Court to enter appearance before they can apply to set aside the default judgments and the writ of summons.

I do not consider that O. 12 r. 6 has any bearing on the conduct of this application as the procedures for setting aside default judgments and the writ of summons are governed by O. 13 r. 8 and O. 12 r. 7 (1) of the Rules. These two rules do not require the defendants to obtain leave of the Court as a precedent to their application of setting aside the default judgments or the writ of summons. They are at liberty to apply to have such judgments and the writ set aside by the filing of a summon in chambers supported by an affidavit which they have done in this case and procedure wise, I do not see anything wrong with the steps taken by the defendants to have the default judgments and the writ of summons set aside.

As I have already ruled above that the plaintiff had the capacity to sue at the time the writ was issued and she can give a valid receipt for the debt and since the default judgments have not been shown to have been irregularly obtained, I had dismissed the defendants' application with costs.

Also found at [1985] 1 CLJ 352